LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 29 1954
HAROLD B. WILLEY, Clerk

No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1954

JOHN P. PETERS, PETITIONER

v.

OVETA CULP HOBBY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 376

JOHN P. PETERS, PETITIONER

v.

OVETA CULP HOBBY ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

In *Bailey* v. *Richardson,* 182 F. 2d 46 (C. A. D. C.), the court below held that the removal of a Federal employee who is not in the classified civil service presents no justiciable question under the Constitution or under the statutes governing the appointment and separation of Government employees. It further held, assuming *arguendo* that the plaintiff in that case occupied a position in the classified civil service, that Executive Order 9835 (12 F. R. 1935), which established the President's Employees Loyalty Program, is constitutional. This Court affirmed by an equally

divided vote. 341 U. S. 918. Since the constitutional issues which petitioner seeks to raise in this case are identical to those decided in the *Bailey* case, the court below, on the authority of its earlier ruling, rejected petitioner's challenges to the validity of Executive Order 9835.

We recognize, of course, that, in view of the equal division in the *Bailey* case, the constitutional questions there considered have not been finally resolved by this Court and that it may wish again to examine the personnel security measures utilized in the Executive branch. However, we suggest that the present case is not appropriate for this examination.

1. Executive Order 9835 which petitioner here attacks is no longer in existence and the constitutional issues which the petition seeks to present now arise in an entirely different context. Executive Order 9835 was revoked and superseded in April 1953, by Executive Order 10450. 18 F. R. 2489. The Loyalty Review Board, whose decision petitioner challenges, was abolished (E. O. 10450, Sec. 12).[1] And the "disloyalty" standard under which the loyalty program was administered has been replaced. Executive Order 10450, carrying out the purpose of the Act of August 26, 1950 (64 Stat. 476, 5 U. S. C. 22–1, *et seq.*), is keyed to the broader standard that appointment and

[1] In the circumstances, it is clear that this action is moot insofar as the respondent members of the defunct Loyalty Review Board are concerned.

retention in federal employment be "clearly consistent with the interests of the national security" (Secs. 2, 5, 6, 7, 8). Also of importance is the fact that, unlike the procedure under Executive Order 9835, the regulations issued by the Attorney General under Executive Order 10450 provide for an administrative hearing to determine whether an organization should be designated as within the purview of the Order. 18 F. R. 2619.[2] In the light of this Court's opinions in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, it would appear that the inability of either the employee or the organization under Executive Order 9835 to contest, in an administrative hearing, the propriety of a proposed designation of the organization by the Attorney General was a significant factor in the results reached in both the *Bailey* and *Joint Anti-Fascist Refugee Committee* cases. See e. g., 341 U. S. at 183–187 (Jackson, J., concurring).[3]

---

[2] The validity of the current Order and of these regulations is now being challenged in the District Court for the District of Columbia. *National Lawyers Guild* v. *Brownell,* Civil Action No. 5494–53.

Section 41.1 (a) of the Attorney General's regulations issued under Executive Order 10450 provides that organizations previously listed under the prior program had 10 days within which to file a written notice of contest. 18 F. R. 2619.

[3] It should be noted that the complaint here specifically attacks petitioner's dismissal on this score: "The purported hearing was further conducted in violation of Executive Order 9835 in that the Inquiry Board on Employee Loyalty, Federal Security Agency, treated as evidence a purported 'listing' by the Attorney General of the United States of

2. Not only is the program petitioner attacks no longer in effect, but his status is far different from that of the mass of federal employees. It is undisputed that he did not occupy a position in the classified civil service (Tr. 28). Petitioner stipulated that he was a "temporary part-time or intermittent" employee (Tr. 27), a "Special Consultant * * * on a when-and-as employed basis, with compensation at a specified per diem rate for days actually employed" (Tr. 27).[4] Accordingly, his status under the civil service laws was no higher than that of an applicant for employment. Cf. *Friedman* v. *Schwellenbach,* 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; 5 CFR (1949 ed.) 2.112. Even if it be assumed that a permanent employee has certain constitutional rights in retaining his job, there are good grounds for differentiating the case of one who has a status no higher than an applicant for employment. The latter's case should not be the vehicle for deter-

organizations within the purview of Executive Order 9835, Part III, § 3, Part V, § 2f, which purported 'listing' was not made 'after appropriate investigation and determination' as required by Executive Order 9835, Part III, § 3" (R. 10–11).

[4] The complaint alleges that his duties required his presence in Washington for about ten days each year (R. 3). The answer alleges that petitioner's presence in Washington was required from four to nine days each year (R. 15). The answer further alleges that his appointment as a Special Consultant was for a term expiring December 31, 1953 (R. 16).

mining the rights of regular Government employees.[5] Moreover, petitioner's term of appointment apparently expired on December 31, 1953 (see fn. 4), and he does not claim to be a present applicant for a federal position. See Pet. 7.[6]

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

OCTOBER 1954.

---

[5] In calling the Court's attention to the temporary nature of petitioner's employment, we have not lost sight of the fact that the petitioner in the *Bailey* case technically also had the same status. However, the claims of a classified civil service employee were also before the Court at that time in a companion case. *Washington* v. *McGrath*, 341 U. S. 923. For that reason, the Government did not rely on the petitioner's status in the *Bailey* case. See Brief for Respondents, No. 49, October Term, 1950, p. 58, fn. 47.

[6] Petitioner's use of the phrase "stigma of a dishonorable discharge" (Pet. 8) may possibly be an attempt to predicate standing to sue on the common law tort of defamation. It should be noted, however, that unlike the *Joint Anti-Fascist Refugee Committee* case, 341 U. S. 123, there is no allegation here that respondents published the alleged defamation of petitioner.

U. S. GOVERNMENT PRINTING OFFICE: 1954